No. 80-242

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1980

EDWARD HIDELGO, SECRETARY OF THE NAVY,

Petitioner,

vs.

ALICE NAKSHIAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PATRICIA J. BARRY
Attorney for Respondent
1066 National Press Building
Washington, D.C. 20045
(202) 347-6463

4141 LUTZ APPELLATE PRINTERS, INC.
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QUESTION PRESENTED

Whether a plaintiff in an action against the United States under Section 15(c) of the Age Discrimination in Employment Act, 29 U.S.C. §633a(c), is entitled to trial by jury?

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Patricia J. Barry, on behalf of respondent Alice Nakshian, respectfully opposes the petition for a writ of certiorari filed by the Solicitor of the United States on behalf of Edward Hidalgo, Secretary of the Navy, to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

The Question Presented for review is at page i of the Solicitor's petition and at page i of this brief. The Opinions

Below, Statement of Jurisdiction, Statutory Provisions Involved and Statement are found at pp. 1-4 of the Solicitor's petition and at Appendices A, B, C and F attached thereto.

REASONS FOR DENYING THE WRIT

I.

This Court recently decided the question of whether individuals, filing civil actions under the Age Discrimination in Employment Act ("ADEA") are entitled to jury trials in *Lorillard v. Pons,* 434 U.S. 575 (1978).

In *Lorillard,* this Court determined that employees bringing an ADEA suit against private, state or public employers were entitled to a jury trial, pursuant to §7(c) of the ADEA, 29 U.S.C. §626(c) (1976). This Court found such a right because of the use of the term of art "legal relief" in the wording of the statute. In this Court's view, the use of that term, "legal relief" provided further evidence of Congress' intention to provide for jury trials since it is settled that in cases in which legal relief is available and legal rights are determined the Seventh Amendment guarantees the right to jury trial. 434 U.S. at 583.

The same reasoning this Court applied in *Lorillard* has equal force when applied to federal ADEA cases, despite the Solicitor's claim to the contrary (Petition, 6-7, hereinafter "Pet.").

For the first time, the government raises a defense not raised in any of its memoranda or briefs at the trial or appellate levels below. The defense is that Section 15 of the ADEA is separate unto itself by the addition of Subsection (f) which provides that ". . . personnel actions in the federal government shall not be 'subject to, or affected by' any other provisions of the Act. (Citations omitted.)." (Pet. 6-7).

In alleging that §15(f) of the ADEA excludes federal employees from being covered by the provisions of §7 of the ADEA, the government is taking a position directly contradictory to the position it took in *Moysey v. Andrus,* 21 EPD ¶30,488 (D.D.C. 1979).

In that case, the government argued §7(b) of the ADEA applied to federal employees, therefore, making the provisions of 29 U.S.C. §§211(b), 216(b), 217 and Subsection (c) of §7 applicable to federal employees.

Thus, according to the government, federal employees seeking to certify class actions had to meet the "opt-in" requirement of §216, which the court found ". . . mutually exclusive with the Federal Rules regarding class actions. See *e.g., La Chapelle v. Owens-Illinois, Inc.,* 513 F. 2d 286, 289 (5th Cir. 1975)." *Id.* at p. 13,691.

While the government argued in *Moysey* that Section 7(b) [and, therefore, because of the language in Section 7(b), Section 7(c)] was applicable to federal ADEA cases, in the instant case, it reversed itself, making its legal reasoning contradictory and inconsistent.

The Solicitor goes on to conclude that ". . . [t]here is no occasion to construe Section 15(c) in any particular way in order to avoid a constitutional question, because the Seventh Amendment does not apply to suits against the federal government. Nor, for the same reason, can the word 'legal' be deemed a term of art as respects the availability of jury trials involving the federal government." (Pet. 7).

The Solicitor's reasoning is erroneous for several reasons:

First, even if one assumes that the language of Section 15(f) makes 29 U.S.C. §633a(a-g) complete in itself, one still has the provisions of §633a(c):

> "Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for *such legal or equitable relief as will effectuate the purposes of this chapter.*" (Emphasis added.)

This language is identical to the language found in Section 7(c)(1) except that the words "Federal district" are added to Section 15(c), and in Section 7(c)(1) there is a proviso added that the right of the individual to bring such action terminates if the EEOC brings an action on behalf of that individual.

Just as this Court found in *Lorillard* that Congress was deemed to be aware of what the term "legal relief" meant at the time it used that language in §626(c)(1), so it is deemed to have knowledge of what that term meant when it incorporated the identical language in §633(a)(c) without reservation.

Furthermore, the manner in which Congress made the federal government subject to the ADEA further supports the proposition that Congress intended identical court procedures for both federal and nonfederal employees as evidenced by the use of identical language in Sections 626(c)(1) and 633a(c).

As originally enacted, the ADEA did not protect employees of the federal government, which was expressly excluded from the definition of "employer" in Section 11(b) of the Act, 29 U.S.C. §630(b). Similarly, the Fair Labor Standards Act as enacted in 1938 did not cover federal employees. §3(d), 52 Stat. 1060.

In 1974, however, Congress simultaneously amended both the ADEA and the FLSA to extend their coverage to federal employees. Fair Labor Standards Amendments of 1974, Pub. L. 93-259, 93d Cong., 2d Sess., 88 Stat. 54, 58-59, 74-75. Federal employees were made subject to the FLSA by revising the definition of "employee" in Section 3(e) of that Act, 29 U.S.C. §203(e), to include them. In addition, the provision in Section 16(b) of the FLSA, 29 U.S.C. §216(b), which creates a private right of action for unpaid wages and liquidated damages, was revised to provide that "Action to recover such liability may be maintained against *any employer (including a public agency)* in any Federal or State court of competent jurisdiction . . . ." (emphasis added). (Taken from Appellee's Brief below.)

It is evident from the means by which federal employees were made subject to the FLSA that Congress intended to apply the same enforcement procedures to them as had previously been applied under the FLSA to private-sector employees. Under the 1974 FLSA amendments, federal employees were simply considered additional covered employees, and the amendment contains not the slightest indication that different procedures were intended nor any statutory provision that would authorize different treatment. The definition of employee and the designation of suable employers were simply revised to include the government. Thus, it must be concluded the federal employees bringing suit under the FLSA have a right to jury trial, and *Carter v. Marshall*, 457 F. Supp. 38 (D.D.C. 1978), so holds.

With that point established, the resolution of the present case ineluctably flows from the *Lorillard* decision. As noted above, *Lorillard* held that Congress was presumed to be aware of the court decisions under the FLSA holding that the right to jury trial existed in private actions. With that knowledge, Congress expanded *FLSA* coverage to federal employees by statutory language that must be read as intended to apply the

same procedures to FLSA actions brought by federal employees as to those brought by other employees, including the right to jury trial. *Lorillard* also held that Congress intended to apply the same procedures to ADEA enforcement as existed for FLSA enforcement. Since, as just demonstrated, Congress intended to grant a jury trial right in FLSA cases for all actions, including those brought by federal employees, when it simultaneously amended the ADEA to cover federal employees Congress therefore also intended that actions brought by federal employees under the ADEA should be subject to jury trial.

This conclusion is bolstered by the legislative history of the 1974 amendments. The application of the ADEA to federal employees was seen as a "logical extension of the Committee's decision to extend FLSA coverage to Federal, State, and local government employees." S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974). Moreover, the omission of federal employees from the ADEA as originally enacted "did not represent a conscious decision by Congress to limit the ADEA to employment in the private sector" but reflected only the fact that most governmental employees were not then subject to the FLSA. *Id.* This close linkage between the FLSA and the ADEA, which was acknowledged with explicit reference to federal government employees, provides further evidence that the use of FLSA procedures, including jury trial, was intended for ADEA actions against the government.

Thus, the government misses the point when it contends that *Lorillard* is applicable to this case because the FLSA right to jury trial was based on the Seventh Amendment guarantee, which does not govern cases brought against the United States. The Supreme Court held that Congress intended to adopt FLSA practice for ADEA enforcement regardless of its constitutional necessity, *Lorillard v. Pons, supra,* 434 U.S. at 577, and the reasons why FLSA practice came to be as it was in 1967 are irrelevant. (Taken from Appellee's Brief below.)

In short, the reasoning of *Lorillard* on the congressional intent to adopt FLSA procedures for the ADEA is alone dispositive of this case.

For this reason alone, the petition should be denied.

II.

The issue raised in the petition affects a very small number of cases litigated in the United States, and affects only a very small percentage of the cases in which the government is involved.

The Solicitor argues in part 4 of the petition, pages 13 and 14, that allowing jury trials in ADEA cases generally would increase the time and expense of litigating these cases and would add to the congestion in the courts.[1] It also argued that jury trials would lead to damage awards that were overly generous because of the virtually unlimited ability of the government to pay the verdict.

Furthermore, the Solicitor stated in footnotes 11 and 12 on page 13 of his petition that there were sixteen ADEA cases pending against the federal government where a jury demand had been made and twenty-three Title VII cases pending in the District of Columbia in which an ADEA claim was included in the complaint. It did not state whether jury demands had been made in the twenty-three Title VII cases with ADEA claims.

The number of ADEA cases pending in the District of Columbia against the federal government in which there is a jury demand as stated by the Solicitor demonstrates to this Court the tiny percentage federal ADEA litigation makes in comparison to the total litigation in which the government is involved in the District of Columbia.

---

1. *See also* Pet. 4-5.

As of June 30, 1977, there were 2,464 cases filed in the District of Columbia. Of those cases, there were 1,464 cases in which the government was a party. As of June 30, 1978, 2,454 cases were filed in the District of Columbia, of which 1,516 involved the government as a party. As of June 30, 1979, 3,121 cases were filed in the District of Columbia of which 1,974 involved the government as a party. As of June 30, 1980, 3,534 cases were commenced in the District of Columbia of which 2,228 involved the government as a party.[2]

Sixteen cases certainly will not cause congestion or increase the time and expense of litigating cases when one considers that the government was a party in 2,228 cases in the District of Columbia, as of June 30, 1980.

Furthermore, this author and her staff assistant examined the cover sheets filed with complaints in the District of Columbia for the months August 1980, and September 1980. There were eight jury demands made in which the government was a party, and only three of those involved the ADEA. For August 1980, there were five jury demands made in which the government was a party. None involved the ADEA.

Thus, federal ADEA litigation, in fact, makes up a very small percentage of the actual government litigation now occurring in the District of Columbia.

In addition, this writer has been involved in nine to eleven employment discrimination cases in which trials were conducted in the District of Columbia or in the Eastern District of Virginia. One was a federal ADEA case and was tried by a jury. This writer found that the jury trial was one of the most efficiently

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2. *The Annual Report of the Director*, published by the Administrative Office of the United States Courts, Appendix Tables C-1, June 30, 1977; June 30, 1978; June 30, 1979; June 30, 1980.

run trials, lasting 3-1/2 days, as contrasted with some of the bench trials this author has been involved with in Title VII cases which have lasted as long as eight and eleven days.

The Solicitor argues in the petition, as did Judge Tamm in his dissent (Appendix A, 23a) that juries, more so, apparently, than judges, might be overly generous in making awards in ADEA cases where the federal government is the employer. That is not a factor that should be taken into consideration in determining whether Congress has intended ta right to a jury trial.

As Justice Black said, a jury trial is "a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizens, whether guaranteed by the Constitution or provided by a statute should be jealously guarded by the Courts. *Jacob v. New York,* 315 U.S. 752." *Galloway v. United States,* (dissent. opin. J. Black), 319 U.S. 372, 397 (1943).

Further, state juries, like federal juries, might just as well be inclined to make overly-generous awards since state juries would be well aware that the awards would be coming from tax revenues. Nonetheless, this Court held that state employees were entitled to jury trials in ADEA cases in *Lorillard v. Pons, supra.*

III.

There is no conflict of decisions by courts of appeal on this issue.

The only circuit to decide on the issue is the District of Columbia Circuit, the circuit for the seat of government, and it did so in favor of jury trials for federal employees.

Thus, if this Court denies this petition, inasmuch as it is a petition for review of the decision of the leading circuit on issues affecting federal employees, other courts of appeal will likely follow the District of Columbia's ruling on this issue when it is presented to them, thus obviating the need for this Court to consider the issue on its merits.

IV.

The position of the Solicitor on this issue is that the federal government as an employer should be treated differently, and has, in the words of Judge Tamm, with respect to jury trials, "special concerns." (Appendix A, 23a).

Other than the speculation of "overly-generous" awards, neither Judge Tamm nor the Solicitor spells out what those "special concerns" are.

Nor does the government claim that there is a compelling state interest that would be served by denying federal employees a jury trial, other than the claim that sixteen cases out of 2,228 cases would cause congestion for the courts because of the jury demand (*see* pp. 9-10 of this brief).

In *Harris v. U.S. Department of the Treasury*, 489 F. Supp. 476, 480 (N.D. Ill., 1980), the court stated:

> "In order to find that Congress intended to deny this right in ADEA suits brought by governmental employees, this Court would require more convincing evidence of congressional intent to achieve this purpose than has been provided by defendants. In some cases, perhaps, evidence that governmental interests would be frustrated by permitting jury trials might be persuasive. [footnote omitted]. In this

> case, however, the defendants have identified no governmental interest that would be affected adversely by allowing jury trials in public employee ADEA suits."

In addition, Attorney General Bell has ordered attorneys under his supervision not to take positions claiming a special status or role for the federal government in employment discrimination claims:

> "In a similar vein, the Department will not urge arguments that rely upon the unique role of the Federal Government. For example, the Department recognizes that the same kinds of relief should be available against the Federal Government as courts have found appropriate in private sector cases, including imposition of affirmative action plans, back pay and attorney's fees . . . . [citations omitted]. *Thus, while the Department might oppose particular remedies in a given case, it will not urge that different standards be applied in cases against the Federal Government than are applied in other cases.*" (Emphasis added.) Memorandum for United States Attorneys and Agency General Counsels from Attorney General Bell, Aug. 31, 1977., p. 2.

Although the Solicitor describes administrative enforcement procedures adopted in 1974 when Congress amended the ADEA to include federal employees under its protection (*see* Pet. 6, fn. 3), he fails to state that those administrative enforcement procedures are no longer in effect because of the Reorganization Act of President Carter reassigning ADEA enforcement from the Secretary of Labor and the now-defunct Civil Service Commission to the Equal Employment Opportunity

Commission (Reorganization Act No. 1 of 1978, 43 F.R. 19,807, *reprinted* in 92 Stat. 3781).

Congress did not object to this reassignment and the responsibility for the administrative enforcement of the ADEA for both federal and nonfederal employees is now vested in the EEOC.

Furthermore, federal employees, like nonfederal employees, are entitled to file suit without going through an administrative remedy, with the difference being the federal employee need only wait thirty days to go to the courts after serving a notice of intent to sue on the EEOC, 29 U.S.C. §633a(d); whereas, a nonfederal employee must wait at least sixty days to go to court after serving a charge of age discrimination on the EEOC, 29 U.S.C. §626(d).

To argue that there are different administrative procedures and jurisdictional prerequisites for federal and nonfederal employees as evidence that Congress intended that court procedures for federal employees would be different from those for nonfederal employees in ADEA cases no longer has any relevance, if it ever did, as a result of the Reorganization Act.

V.

The government has not always opposed jury trials in federal ADEA cases.

Formerly, it conceded that because of the holding in *Lorillard v. Pons,* federal employees were under the ADEA. However, the government argued that federal employees were not entitled to jury trials under the Equal Pay Act, 29 U.S.C. §206 (1-4), a position that the Honorable Thomas A. Flannery found inherently contradictory in his memorandum opinion in

Carter v. Marshall, 457 F. Supp. 38 (D.D.C. 1978) at p. 5, slip opin., fn. 3.

> "There is an inherent inconsistency in the government's opposition in that the 1974 amendments to the FLSA also made the ADEA applicable to federal employees, but the government does not oppose a jury trial on federal employees' ADEA claims. *See* 88 Stat. 55, 74 (1974)."

See also, pp. 15-16 of this brief where it is pointed out the government's earlier reliance on jurisdiction of federal ADEA cases resting exclusively in district courts as evidence of congressional intent allowing jury trials in federal ADEA cases, a position it now opposes in the petition.

VI.

District Court jurisdiction implies a right to jury trial.

The Supreme Court has twice considered statutes that conferred jurisdiction on district courts over actions against the United States. In each case, the Court held that by assigning the cases to the district courts, Congress intended to grant plaintiffs the right to a jury trial. *Law v. United States,* 266 U.S. 494, 496 (1925); *United States v. Pfitsch,* 256 U.S. 547 (1921); *see also, Crouch v. United States,* 8 F. 2d 435 (4th Cir. 1925); *United States v. McGovern,* 299 F. 302 (9th Cir. 1924). Since ADEA actions by federal employees must be brought in district court, 29 U.S.C. §663a(c), jury trial was intended.

The Solicitor is misleading this Court when he argues that there is no longer any general applicable statutory right to jury trial in federal district court because of the repeal of 28 U.S.C.

§770 by the Revision Act of 1948, Ch. 646, Section 39, 62 Stat. 992 (Pet. 10-11).

Sections 9 and 12 of the Judiciary Act of 1789 state in part:

> "Sec. 9: . . . (a) saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . . (d) And the trial of issues in fact, in the district courts, in all cases except civil causes of admiralty and maritime jurisdiction, shall be by jury."

> "Sec. 12: . . .and the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury."

These sections of the Judiciary Act later became Revised Statutes 566 and 648. Later, they were codified at 28 U.S.C. (1925 ed.) §770. While it is true that 28 U.S.C. §770 was repealed by the Revision Act of 1948, 28 U.S.C. §1873 was enacted in its place. That section grants a trial by jury to either party who demands it in any case of admiralty and maritime jurisdiction relating to contract or tort arising upon or concerning any vessel of 20 tons or upward.

As the Historical and Revision Notes to that section indicate:

> "The first sentence of section 770 of Title 28 U.S.C. 1940 ed., providing generally for the right of jury trials in district courts, was omitted as covered by Rule 38 of the Federal Rules of Civil Procedure." 28 U.S.C.A. §1873, *Historical and Revision Notes,* page 317. (*See also,* H.R. 3214,

> 80th Congress, 2nd Session, stating that R.S. 566 and 648 are to be found at the newly-revised Title 28 at Section 1873.)

Thus, the right to a jury trial in federal district court remains in effect under the Federal Rules of Civil Procedure. It was never abolished.

The Solicitor is incorrect when he argues that Rule 38(a) of the Federal Rules of Civil Procedure ". . . does not state a general rule or presumption that jury trials are available whenever Congress confers jurisdiction on the District Courts" (Pet. 8-9) for the reasons set out above, namely that Rule 38 is an embodiment of the repealed portion of 28 U.S.C. §770 so stating.

The Solicitor's argument is therefore clearly erroneous when he argues that the substantial reliance on *United States v. Pfitsch,* 256 U.S. 547 (1921) by the court of appeals is misplaced, inasmuch as the general statutory right to jury trial in district court found in 28 U.S.C. §770 is now contained in Rule 38(a) of the Federal Rules of Civil Procedure.

Furthermore, this argument is directly contradictory to what the government stated in a memorandum in support of its reply to plaintiffs' response to defendants' opposition to plaintiffs' motion for a jury trial in *Carter v. Marshall,* C.A. No. 77-0365:

> "There is another important difference between the EPA and the ADEA. As we indicated in our last pleading on the jury trial issue, jurisdiction in an EPA action is founded on the Tucker Act because 29 U.S.C. §216(b) allows the United States to be sued 'in any Federal . . . court of competent jurisdiction.' Such suits can

be brought in either the district courts or the Court of Claims and thus there is no right to trial by jury. However, Congress authorized suits under the ADEA *only* in district courts, 29 U.S.C. §663a(c), and therefore the same argument cannot be made with respect to ADEA suits in which the United States is a defendant, because, in some instances, there is a right to a jury trial against the United States when the United States can be sued *only* in a district court. *United States v. Pfitsch,* 256 U.S. 547 (1921)."

Moore's Practice supports this reasoning:

"The particular grant of jurisdiction will determine the method of trial, court of jury, in the absence of some expressed provision dealing with the method of trial. . . . *If the action against the United States is brought under another jurisdictional statute and if under that statute the district court sits as a court of law then the doctrine of United States v. Pfitsch is applicable and there is a right of jury trial to all legal issues.* An example is an action brought under the War Risk Insurance Act." 5 J. Moore, *Fed. Pract.* ¶ 38.31[2] at 236, 236.3 (2nd Ed. Rev., 1979) (emphasis added).

In *Atlas Roofing Co. v. Occupational Safety and Health Administration,* 430 U.S. 442, 458 (1977) this Court stated:

". . . [T]he question whether a fact would be found by a jury turned to a considerable degree on the nature of the forum in which the litigant found himself. Critical factfinding was performed without juries in suits in equity, and there was no

> jurisdiction in admiralty, *Parsons v. Bedford,* 3 Pet. 433 (1830); . . . The jury was the factfinding mode in most suits in the common-law courts, . . ."

The court of appeals also concluded that the exclusive jurisdiction of the district courts over federal ADEA cases supports the inference Congress intended jury trials, and relied on *Pfitsch* and *Law* as authorities for its conclusion (Appendix A, 10a-11a).

VII.

There is no presumption against jury trials in actions involving the United States.

The Solicitor states: "It is well settled that the Seventh Amendment right to trial by jury in cases of common law does not extend to actions against the federal government because suits against the sovereign were unknown at common law . . . ." (Pet. 4). This is not a correct statement.

In *Chisholm v. Georgia,* 2 Wall 419, 459-460 (1792) Judge Wilson stated:

> "In England, according to Sir William Blackstone, no suit can be brought against the King even in civil matters. So, in that kingdom, is the law at this time received. But it was not always so. Under the Saxon government a very different doctrine was held to be orthodox. Under that doctrine, as we are informed by the Mirror of Justice, a book said by Sir Edward Coke to have been written, in part, at least, before the Conquest; under that government, it was ordained, that the king's court should be

> open to all plaintiffs by which, without delay, they should have remedial writs, as well as against the king or against the queen, as against any other of the people. (d). The law continued to be the same for some centuries after the conquest. Until the time of Edward I, the king might have been sued as a common person. The form of the process was even imperative . . . *True, it is that now, in England, the King must be sued in his courts by petition; but even now the difference is only in the form, not in the thing. The judgments or decrees of those courts, will substantially be the same upon a precatory as upon a mandatory process.*" (Emphasis added.)

From the shaky premise that the suits against the sovereign were unknown at the common law, the Solicitor states at p. 4 that it follows "[a]ccordingly, there is no right to trial by jury in actions against the government unless 'Congress, in the legislation cited, has made it applicable.' *Galloway v. United States, supra,* 319 U.S. at 389."

Since Ms. Nakshian contends, as did the court of appeals conclude, that "the legislation cited" made a jury trial applicable to federal ADEA cases, obviously what the Solicitor means, as he later states in his petition at pp. 12 and 13, is that unless there is an explicit statutory statement allowing jury trials against the federal government then ". . . the courts must assume that Congress does not intend to permit jury trials when it authorizes actions against the United States" and the circuit court's discussion in this case ". . . represents a marked departure from these principles." The Solicitor's conclusions are plainly incorrect.

In its brief below, as in the petition, the government relied exclusively on an erroneous axiom that there is sovereign immunity from jury trials (Appellant's Brief, 11).

The court of appeals pointed out in footnote 4 of its opinion (Appendix A, 9a):

> "This view seems to be based on the supposition that there is a presumption against jury trial in actions against the Government even where sovereign immunity has been waived. The source of this supposition is not clear, but it appears to be connected with a misunderstanding of the doctrine of sovereign immunity. *See* dissenting opinion, ____ F2d at ____ (pp. 11-12). Since sovereign immunity bars *all* actions against the Government — actions tried to the court as well as those tried to a jury — it is difficult to see why this doctrine should create a presumption against any particular method of trial. Indeed, if there are to be any presumptions, it would seem that the preference for jury trials in our jurisprudence would support a presumption in favor of such trials. In any event, once Congress has waived the Government's immunity, and where it has not explicitly specified the trial procedure to be followed, sovereign immunity drops out of the picture. Courts must then scrutinize the available indicia of legislative intent to see what trial procedure Congress authorized."

In addition, as this Court pointed out in *Curtis v. Loether*, 415 U.S. 189, 193 (1974), while the thrust of the Seventh Amendment is to preserve the right to jury trial as it existed in 1791, "[I]t has long been settled that the right extends beyond

the common law forms of action recognized at that time. Mr. Justice Story established the basic principle in 1830:

> "'The phrase "common law," found in this clause is used in contradistinction to equity, in admiralty, in maritime jurisprudence. . . . By *common law* [the Framers of the Amendment] meant that . . . not merely suits which the *common* law recognize under its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered. . . . In a just sense, the amendment may well be construed to embrace all suits which were not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.' *Parsons v. Bedford,* 3 Pet. 433, 446-447 (Emphasis in original)."

In an action wherein the government or any other employer covered by the ADEA is sued for unpaid minimum wages and overtime compensation was unheard of in the common law. Yet, there is no question but the ADEA provides a legal remedy which this Court found in *Lorillard, supra,* and, therefore, entitles the parties in ADEA actions to a jury trial.

In *Leimer v. Woods,* 196 F. 2d 828 (8th Cir. 1952) the court held the defendant-landlord was entitled to a jury trial, although the Administrator could have brought suit in the Court of Claims where jury trials are not allowed. *See McElrath v. United States,* 102 U.S. 426, 439-40 (1880).

The Court found there was a right to a jury trial based on the Seventh Amendment since the recovery of treble damages

fell within the traditional scope of the common law actions of debt. *See* Emergency Price Control Act of 1942, Chap. 26, §205(e), 56 Stat. 23.

This Court also recently stated there was a right to a jury trial in a *Bivens* action against federal officials for money damages. *See Carlson v. Green,* ____ U.S. ____, 100 S. Ct. 1468 (1980).

In conclusion, the Solicitor's petition confuses the well-established principle of sovereign immunity from unconsented suits against it with a never-recognized theory of sovereign immunity from jury trials. It is clear that the United States may not be sued without its consent and that the United States may condition its waiver of such sovereign immunity by establishing the terms and conditions under which it may be sued. *See, e.g., United States v. Testan,* 424 U.S. 392, 399 (1976). One of the conditions the government may impose when it consents to be sued is that the case is to be tried to the court without a jury. *McElrath v. United States,* 102 U.S. 426, 439-40 (1880). But this doctrine in no way implies that jury trials are unavailable unless they are unequivocally authorized by Congress.

As further evidence of an absence in the law of a presumption against jury trials when the United States is sued, Congress has found it necessary to state explicitly that there shall be no jury trial. *See* 28 U.S.C. §2402 [providing that any action under 28 U.S.C. §1346, except under §1346(a)(1), shall be tried by the court without a jury]; and 28 U.S.C. §2409a(e) (providing that any action brought under §2409a against the United States shall be tried without a jury).

VIII.

A fair statutory interpretation of the ADEA infers jury trials for federal ADEA cases.

The issue presented to the Court in this case is an ordinary question of statutory interpretation in which it must be determined whether Congress did or did not intend that government employees who bring actions under the ADEA should have a right to jury trial. Congress necessarily intended some procedure and the statute must be construed to ascertain what that procedure is. No presumption against jury trial exists and no unequivocal grant of the right to jury trial need be found. Like other issues of statutory interpretation, the fact that the question is not resolved by explicit language in the ADEA simply means that the Court must look elsewhere to infer congressional intent. That is precisely what this Court did in *Lorillard v. Pons, supra,* in which congressional intent to confer a right to jury trial was inferred from other language in the ADEA and the Act's legislative history.

In this section we demonstrate by similar reasoning that Congress intended that jury trial would be available in ADEA action brought by federal employees.

In *Harris v. United States Department of Treasury,* 489 F. Supp. 476, 478 (N.D. Ill. 1980), the court held the following:

> "In extending coverage to government employees there is no indication that the Congress intended to distinguish between the procedures available to private and public employees. Rather Congress hoped that the expanded coverage would 'remove discriminatory barriers against employment of older workers in government jobs at the federal and local

> government level *as it has and continues to do in private employment'* HR REP #93-913, 93rd Congress, 2nd Session, reprinted in [1974] U.S. Code, Congressional and Administrative 2850." (Emphasis supplied.)

The *Harris* court concluded:

> "The legislative history simply does not support the conclusion that the Congress intended to distinguish between private and public employees for this purpose. Accord *Nakshian,* 20 FEP cases at 928 [*Nakshian v. Claytor,* 20 FEP cases 927 (D.D.C. 1979)]."

The *Harris* court also rejected the government's argument in that case, also argued by the Solicitor in the petition, that Section 15(f), combined with the expressed provision for a jury trial in 29 U.S.C. §626(c)(2), was intended to deny the right to jury trials to federal employees suing under the ADEA.

A review of the legislative history surrounding the jury trial amendment demonstrates this.

The jury trial issue was raised on the Senate floor after the House had already passed the bill. The primary purpose of the bill was the highly controversial one of revising the age for mandatory retirement, and the jury trial amendment was considered only briefly. Senator Kennedy offered the amendment on October 19, 1977 -- before *Lorillard* had been decided. He pointed out that three out of four circuits that had considered the issue had ruled that jury trial was available under the ADEA, that the amendment would clarify the question, and that jury trials were especially appropriate in age discrimination cases:

> "[J]uries are more likely to be open to the issues which have been raised by plaintiffs. Sometimes, a judge may be slightly callous, perhaps because he himself is protected by life tenure, or because he is somewhat removed from the usual employer-employee relationship. The jury may be more neutral in such circumstances.
>
> * * *
>
> It seems to me to be wise to insure that particular protection to those who are subject to age discrimination."

123 Cong. Rec. S17297 (daily ed. Oct. 19, 1977). The amendment was immediately adopted without debate. *Id.*

When the bill was eventually reported by the conference committee (Mar. 14, 1978), *Lorillard* had just been decided (Feb. 22, 1978). The conference report adopted the Senate amendment, referring to *Lorillard,* and indeed expanded the amendment to cover liquidated damages expressly, since this issue had been left undecided by the Supreme Court. H.R. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14 (1978).

The reasonable reading of this legislative history is that Congress believed strongly in the appropriateness of jury trial in age discrimination suits and acted to confirm that right wherever doubt appeared — first when the split in the circuits clouded the jury trial right generally, and subsequently when the *Lorillard* decision left an aspect of the jury trial right undecided. Section 7 of the ADEA was the legislative focus only because the divided court of appeals' cases involved that section. The strong support for clarifying the right to jury trials in age discrimination cases indicated by the speedy adoption of this unopposed amendment, the fact that jury trial was favored for

reasons relating to perceptions about the comparative characteristics of judges and juries (and not for reasons related to employers or employees), and the complete absence of any indication that a different result would have been reached had the question of federal government employees specifically been raised all point to a conclusion that Congress intended to provide for jury trials in all ADEA suits brought by employees.

As the court of appeals stated, this reading of:

> "The legislative history of the 1978 amendment is consonant with a statement placed in the Congressional Record on September 5, 1979, by Congressman Pepper, Chairman of the House Committee on Aging and a member of the Conference Committee on the 1978 amendments to the ADEA. Congressman Pepper stated: 'Those who participated in the House and Senate debates [on the amendment] would be surprised to learn that legislative efforts to confirm the right to a jury trial have been construed as a denial of that right. It would be indefensible to deny Federal employees the right to a jury trial. Under any legislative enactment in the field of civil rights, the Federal Government should be the leader not a grudging participant. . . . As chairman of the Committee on Aging, I will continue to watch developments in this area, and will ask for further delineation of the right of Federal employees to a jury trial if conflicting judicial interpretations are not resolved in favor of a jury trial.' *Cong. Rec.* E 4258 (daily ed. Sept. 9, 1979)." (Appendix A, 14a).

In conclusion, amending §633a(c) would have been superfluous since Congress had waived sovereign immunity;

knew the meaning of "legal relief" when it incorporated that term into §633a(c); placed exclusive jurisdiction over federal ADEA cases in the district courts; knew of the right to a jury trial in the district courts, as stated in Rule 38(a) of the Federal Rules of Civil Procedure, an embodiment of the repealed portion of 28 U.S.C. §770; and did not object to the reassignment of the responsibility for the administrative enforcement of the ADEA for both federal and nonfederal employees to the EEOC.

This Court has also found a right to a jury trial against the federal government by implication from the provisions of a statute in *Wickwire v. Reincke,* 275 U.S. 101, 105 (1927):

> "'The right of the . . . [taxpayer] to a jury in such a case is not to be found in the Seventh Amendment to the Constitution but merely arises by implication from the provisions of §3226, Revised Statutes [See 26 U.S.C. §3772], which has reference to a suit at law.'" (5 J. Moore, *Fed. Prac.,* ¶38.31[2] at 239).

This Court's ". . . solicitude for the preservation of the right to the jury trial is illustrated by its statements in *Hodges v. Easton,* 106 U.S. 408 and *City of Montgomery, West Virginia v. Royal Insurance Co.,* 337 U.S. 254." *Leimer v. Woods,* 196 F. 2d 828, 836, f. 7 (8th Cir. 1952).

This solictude is further demonstrated by this Court's holdings in *Beacon Theatres v. Westover,* 359 U.S. 500 (1959); *Curtis v. Loether,* 415 U.S. 189 (1974); *Dairy Queen v. Wood,* 369 U.S. 469 (1962); *Lorillard v. Pons,* 434 U.S. 575 (1978); and *Pernell v. Southall Realty,* 416 U.S. 363 (1974).

Yet, the government would deny federal employees, and no other individuals, the right to jury trials under the ADEA on the basis of the absence of an explicit grant of a right to a jury trial.

As Judge Oberdorfer stated:

> "Once the government has consented to sit, its silence or ambiguity about whether plaintiffs can demand a jury trial should not be grounds for the denial of such trials. Courts have a responsibility to take a close look at Congressional intent and, if necessary, the constitutional right to a jury trial before they hold that plaintiffs are not entitled to trial by a jury of their peers." (Appendix A, 34a-35a).

Judge Aspen stated similarly in *Harris v. Treasury, supra,* (*see* p. 10 of this Brief):

> "Although the principles of the seventh amendment do not control the outcome of this case, the values which underlie the constitutional guarantee of the right to jury trial do merit consideration. Clearly, the tradition of a trial before a jury of one's peers holds a special place in our system of jurisprudence."

Finally, the government urges the Court to set out standards for determining the availability of jury trials in actions against the government in ADEA cases and generally (Pet. 14).

However, the issue that is before this Court is solely whether a federal employee is entitled to a jury trial under the ADEA. The Solicitor has raised and brought to the Court's attention other statutes not raised at the lower court levels and, therefore, are not before this Court at this time.

CONCLUSION

For all of the reasons stated in this brief, the petition for writ of certiorari should be denied.

Respectfully submitted,

s/ Patricia J. Barry
Attorney for Respondent